86-464

No. 86-_____

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, *et al.*,

Petitioners,

v.

JYRL JAMES-MASSENGALE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

WAYNE A. HERSH
CHARLEY M. STOLL
ALAN J. SAXE
Hersh & Stoll
2 Park Plaza, Suite 800
Irvine, California 92714
(714) 474-8224

*SCOTT A. WILSON
SCOTT A. JOHNSON
Littler, Mendelson, Fastiff & Tichy
701 B Street, Suite 300
San Diego, California 92101
(619) 232-0441
*Counsel for Petitioner Saikhon only

September 22, 1986

QUESTIONS PRESENTED

The Court below held that the fringe benefit portion of the California "makewhole remedy" was not preempted by the Employee Retirement Income Security Act (ERISA). That remedy, as interpreted by a California administrative agency and enforced by California courts, is an open-ended award requiring agricultural employers, found to have bargained in bad faith, to pay specified fringe benefit levels to its employees for an indefinite period into the future. The Ninth Circuit ruled that for a state law to be preempted, it must *both* relate to an employee benefit plan *and* "purport to regulate" the matters regulated by ERISA. The court concluded that the challenged law did not satisfy these requisites. The questions presented by this decision are:

1. Is the Court of Appeals' holding that a state law is not preempted by ERISA unless it *both* relates to employee benefit plans *and* purports to regulate matters specifically regulated by ERISA, contrary to this court's decision in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983)?

2. Is the Court of Appeals' finding that the fringe benefit portion of the California makewhole award is a "one-time, lump-sum payment," thus affecting employee benefit plans in too remote, tenuous and peripheral a manner as to be preempted by ERISA, contrary to this court's interpretation of 514 in the line of cases from *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) to *Metropolitan Life Ins. Co. v. Massachusetts*, ____ U.S. ____, 105 S.Ct. 2380 85 L.Ed. 728 (1985)?

3. Is California's "makewhole remedy" in direct conflict with ERISA and thus preempted?

LIST OF PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners in this case are:

Martori Bros. Distributors, an Arizona Partnership; O. P. Murphy Produce Co., Inc., d/b/a O. P. Murphy & Sons, a Texas corporation; J. R. Norton Co., an Arizona corporation; and Mario Saikhon, Inc., a California corporation.

The defendants-respondents in this case are:

Jyrl James-Massengale, Chairman; Gregory L. Gonot, Board Member; Patrick Henning, Board Member; John McCarthy, Board Member; Jorge Carrillo, Board Member; Regional Director, El Centro; Regional Director, Salinas; Agricultural Labor Relations Board, State of California.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

STATUTES vi

OPINIONS BELOW i

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

SUMMARY OF ARGUMENT 5

I. The Decision Below Is Directly Contrary To The Court's Interpretation Of The Preemptive Scope of ERISA 7

II. Supreme Court Review is Necessary Because The Court Of Appeals' Holding That the Makewhole Remedy Is Not Preempted By ERISA Is Based On A Fundamental Mischaracterization Of The Nature Of That Remedy 13

TABLE OF CONTENTS—continued

Page

III. The Makewhole Award Directly Conflicts With Provisions Of ERISA 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Page

Adam Dairy, 4 ALRB No. 24 (1978) ..... Passim

Alessi v. *Raybestos-Manhattan, Inc.*,
451 U.S. 504 (1981) ..... Passim

Robert H. Hickam, 9 ALRB No. 6 (1983) 15,16,21,22

Holtville Farms, Inc. v. *ALRB*,
168 Cal. App 3d 388 (1985) 14,16

Martori Bros., 8 ALRB No. 23 (1981) 3

Metropolitan Life Ins. Co. v. *Massachusetts*, _____ U.S.
_____, 105 S. Ct. 2380 (1985) ..... Passim

O.P. Murphy Produce Co., 5 ALRB No. 63 (1979) 3

J.R. Norton Co., 6 ALRB No. 26 (1980) 3

Perry Farms, 4 ALRB No. 25 (1978) 16

Mario Saikhon, Inc., 8 ALRB No. 88 (1982) 3

Shaw v. *Delta Airlines*, 463 U.S. 85 (1983) ..... Passim

Social Security Board v. Nierotko, 327 U.S. 358 (1946) .. 23

TABLE OF AUTHORITIES—continued

Page

Statutues

California Labor Code § 1140 3

California Labor Code § 1142 3

California Labor Code § 1160.3 ..... Passim

N.Y. Exec. Law § § 290-301 (McKinney 1982 and Supp. 1982-1983) 8

N.Y. Wor. Comp. Law § § 200-242 (McKinney 1965 and Supp. 1982-1983) 8

26 U.S.C. § 105 (b) 23

26 U.S.C. § 106 22

26 U.S.C. § 162 22,23

26 U.S.C. § 3121 (a) (2) 22

26 U.S.C. § 3131 (e) 22

26 U.S.C. § 3306 (b) (2) 22

29 U.S.C. § 1052, ERISA § 202 20

29 U.S.C. § 1053, ERISA § 203 21

TABLE OF AUTHORITIES—continued

Page

29 U.S.C. § 1056 (a), ERISA § 206(a) 21

29 U.S.C. § 1144, ERISA § 514 ..... Passim

Miscellaneous

I.R.S. Letter Ruling 7851085 (Sept. 22, 1978) 23

I.R.S. Letter Ruling 8052103 (Oct. 3, 1980) 23

H.R. Conf. Rep. No. 93-1280, p. 383 (1974) 9

S. Conf. Rep. No. 93-1090, p. 383 (1974) 9

No. 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, *et al.*,

Petitioners,

v.

JYRL JAMES-MASSENGALE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Martori Brothers Distributors, O.P. Murphy Produce Co., Inc., J.R. Norton Co., and Mario Saikhon, Inc. hereby petition this court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in *Martori Brothers, et al. v. Jyrl James-Massengale, et al.,* No. 84-6137, 84-6274, 84-6275 (9th Cir.; Jan. 30, 1986, as mod. April 1, 1986 and June 12, 1986, Petition for rehearing denied, June 24, 1986).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California is unpublished. A copy of this decision appears at App. H-135a in a separately bound appendix to this peti-

tion (hereinafter "App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 781 F.2d 1349 (1986), as mod. at 791 F.2d 799 (1986). These decisions are reprinted at App. J-M.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 30, 1986. App. J-146a. A timely Petition for Rehearing En Banc was denied on June 24, 1986. App. M-169a. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

California Labor Code § 1160.3 (App. O-173a) provides that the Agricultural Labor Relations Board ("ALRB") may, upon a finding that an agricultural employer has refused to bargain in good faith with its employees' bargaining representative, construct a remedy "making employees whole". As interpreted by the ALRB, this "makewhole remedy" includes wages and fringe benefits that the employer might have agreed to had it bargained in good faith. Liability under this remedy continues until such time as the bargaining representative and the employer reach agreement or reach valid impasse.

Petitioners maintain that the fringe benefit portion of this remedy is preempted by ERISA § 514, 29 U.S.C. § 1144 (App. N-170a). That section specifies that ERISA should supersede any and all state laws as they may now or hereafter relate to any employee benefit described in and not exempted by the language of ERISA.

STATEMENT OF CASE

Each of the petitioners are agricultural employers engaged in interstate commerce and operating in California. Each provide ERISA covered plans to their respective employees. Each of these ERISA covered plans provide covered employees with differing levels of benefits and have differing eligibility and vesting requirements.

The ALRB is the state administrative agency that was created by the California State Legislature upon passage of the Agricultural Labor Relations Act ("ALRA") (Cal. Labor Code §§ 1140, et seq.). Chapter 2 of the ALRA specifically creates the ALRB, which consists of five members.

The ALRB is empowered by California Labor Code § 1142 to conduct hearings and make determinations relating to unfair labor practices by agricultural employers and unions. Pursuant to the California Labor Code provision in question, § 1160.3, the ALRB has the power to impose appropriate remedies for such unfair labor practices.

In this case, the ALRB has adjudged that each of the petitioners have violated the ALRA by refusing to bargain in good faith. (Martori Bros., 8 ALRB. No. 23, App. E-87a; O.P. Murphy Produce Co., 5 ALRB No. 63, App. C-50a; J.R. Norton Co., 6 ALRB No. 26, App. O-80a; and Mario Saikhon, Inc., 8 ALRB No. 88, App. G-108a.) In each case, the ALRB ordered the employer to make its agricultural employees whole for all losses resulting from the refusal to bargain in good faith.

The makewhole award in each of these petitioners' cases includes the award of a sum of money representing fringe benefits which the ALRB has determined would have been given to employees under a hypothetical collective bargaining agreement. This hypothetical contract includes what the ALRB determines the wage and fringe benefits would have been had the employer bargained in good faith. Once this hypothetical contract is determined, the ALRB assesses liability against each employer, amounting to the difference between what that employer actually paid during the relevant period of time, and the ALRB's hypothetical contract. The ALRB makewhole remedy is an ongoing remedy. The employer is liable for the difference between the ALRB's hypothetical contract and what the employer actually pays until such time as a contract is agreed to or the employer and the employee's bargaining representative have bargained to valid impasse.

In the United States District Court for the Southern District

of California, petitioners requested declaratory and injunctive relief from the orders and decisions of the ALRB. Petitioners sought the court's declaration that § 1160.3, as interpreted and enforced by the ALRB, was preempted by ERISA, as well as an injunction prohibiting the ALRB from regulating and/or formulating the employee benefit plans offered by petitioners. Additionally, petitioners requested that the ALRB be prohibited from awarding makewhole remedies to agricultural employees which include payouts for fringe benefits.

The District Court, upon hearing cross-motions for summary judgment, denied petitioner's motion for summary judgment and granted respondent's motion, finding that the state statute, as interpreted by the ALRB, was not preempted by ERISA. App. I-144a.

On appeal, the Ninth Circuit Court of Appeals phrased the issue as determining whether Labor Code § 1160.3, as interpreted and implemented by the ALRB, was preempted by ERISA. The court stated that, "Section 1160.3 is preempted if it both 'relate(s)' to an ERISA plan and 'purport(s) to regulate, directly or indirectly' ERISA plans." 781 F.2d at 1356.

The appellate court upheld the summary judgment against petitioners, finding that a

> ...state law is preempted by § 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan'; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans. 781 F.2d at 1358.

The court stated that Labor Code § 1160.3 did not purport to regulate any of the specific areas covered by ERISA and therefore was not preempted. 781 F.2d at 1359.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The decision below is flatly contrary to this court's guiding decisions on ERISA preemption, *Alessi*, 451 U.S. 504, (1981) and *Shaw*, 463 U.S. 85 (1983).

In *Shaw*, this court held that the preemptive scope of ERISA § 514(a) was to be read very broadly. The court held that any state laws that "relates to" pension plans governed by ERISA would be within the preemption provision. The court stated that the phrase "relates to" was to be given its broad common sense meaning holding that a state law "relates to" a benefit plan and is thus preempted if that law "has a connection with or reference to such a plan." 463 U.S. at 97. In *Alessi*, the court stated that, "even indirect state actions bearing on private pension plans may encroach upon the area of exclusive federal concern." 451 U.S. at 525.

In the Ninth Circuit's decision, the court held that not only must a state law "relate to an employee benefit plan to be preempted, it must *also* purport to regulate matters specifically regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans." The appellate court held that if a state law does not purport to regulate the areas that are regulated by ERISA, it could not be preempted. 781 F.2d at 1359.

The appellate court stated that, "ERISA does not purport to regulate the broad spectrum of unlawful employment practices that may be committed by employers: thus ERISA does not prevent a state agency from including in its 'makewhole' awards sums calculated with reference to fringe benefits." 781 F.2d at 1359.

Based on the above, it is clear the Ninth Circuit disregarded this court's guidance with regard to the scope of the preemptive provision of ERISA. This court's decisions have clearly established that regardless of whether the law purports to regulate matters regulated by ERISA or not, the true test is whether the law in effect "relates to" such a plan in the broadest sense. By its own language, the appellate court's "preemption test" is contrary to

this court's, and should be reversed.

The appellate court's decision also misconstrued the very nature of the California makewhole award by analogizing it to a one-time award of damages. In fact, the award is an ongoing obligation requiring the employer to maintain and pay fringe benefits at the levels established by the ALRB until such time as the union and employer reach agreement or impasse. Until one of these two occurrences takes place, the employer is obligated to continue making the makewhole payments, including the fringe benefit portion, at the levels established by the ALRB.

Petitioners maintain that the ALRB's assessment of the fringe benefit portion of the makewhole remedy is preempted by ERISA as it impermissibly relates to employee benefit plans. Even more compelling is the fact that such makewhole awards disregard and conflict with specific provisions of ERISA. This is so because the makewhole award forces the affected employers to pay their agricultural employees certain amounts of fringe benefits without any regard to vesting requirements, eligibility requirements, or the tax ramifications of those payouts. Thus, while ERISA allows employers to establish vesting requirements, eligibility requirements, and the level of benefits, the ALRB's makewhole remedy takes this discretion away from the employer.

For the above reasons, petitioners maintain that the fringe benefit portion of the California makewhole award is preempted by ERISA and that the appellate court's decision upholding the summary judgment against petitioners was based upon a misconstruction and misapplication of ERISA's preemptive provision, as interpreted by this court.

ARGUMENT

I.

THE DECISION BELOW IS DIRECTLY CONTRARY TO THIS COURT'S INTERPRETATION OF THE PREEMPTIVE SCOPE OF ERISA.

This Court has addressed the preemptive scope of § 514(a) of ERISA in a line of cases from *Alessi,* 451 U.S. at 504, to *Shaw,* 463 U.S. at 85, and more recently, in *Metropolitan Life Ins. Co.*, 105 S.CT at 2380. In these cases, this Court has definitively interpreted Congress' intent in enacting the broad preemptive language of § 514. These cases make it clear that § 514 does not only preempt state laws dealing with subject matters specifically covered by ERISA, but preempts any law that relates to an employee benefit plan.

In *Alessi,* the Court found that ERISA preempted a state statute which provided that workers' compensation benefits may be set off against disability pension benefits but not against employees' retirement benefits. The rationale for this finding was that whatever the purpose of the state law, it "relates to" pension plans and thus impermissibly intrudes on the federal regulatory scheme. This Court made short work of the argument that New Jersey raised regarding the purpose of the statute as being solely concerned with protecting an employee's right to workers' compensation and disability benefits. This Court noted:

> *Whatever the purpose or purposes of the New Jersey statute,* we conclude that it relates to pension plans governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law.
>
> * * *
>
> *It is of no moment that New Jersey intrudes indirectly, through a workers compensation law, rather than directly through a statute called pension regulation. ERISA makes it clear that even indirect state action bearing on private pensions*

> *may encroach upon the area of exclusive federal concern.*
>
> * * *
>
> ERISA's authors clearly meant to preclude the states from avoiding through form the substance of the preemption provision.

Alessi, 451 U.S. at 524-525 (emphasis supplied).

In *Shaw,* this court again reviewed the scope of the preemption provision of ERISA. *Shaw* dealt with Human Rights Law, N.Y. Exec. Law 290-301 (McKinney 1982 and Supp. 1982-1983) (hereinafter referred to as "HRL"), which was a comprehensive anti-discrimination statute prohibiting, among other practices, employment discrimination on the basis of sex.

The *Shaw* court was also faced with the Disability Benefits Law, N.Y. Work.Comp. Law § 200-242 (McKinney 1965 and Supp. 1982-1983) (hereinafter referred to as "DBL"), which required employers to pay certain benefits to employees unable to work because of non-occupational injury or illness.

The *Shaw* court was faced with resolving whether or not the HRL and the DBL "related to" employee benefit plans. The court relied upon its holding in *Alessi,* and restated the broad preemptive reach of § 514(a) of ERISA, 29 U.S.C. § 1144(a). The *Shaw* court stated that while, in *Alessi,* the court found preemption based on the conflict between the New Jersey statute and ERISA, no such conflict was present in the New York law before it. The *Shaw* court stated that the finding of preemption in *Alessi* was not based on the preemptive scope of ERISA, and its legislative history, but on the state law's frustration of ERISA's intent. With this background, the *Shaw* court went on to examine the preemptive scope of § 514.

The *Shaw* court specifically held that a law "relates to an employee plan in the normal sense of the phrase if it has a connection with *or reference to* such a plan. *Black's Law Dictionary* 1158 (5th Ed. 1979) ("Relate: To stand in some relation; *to have*

bearing or concern; to pertain; *refer*; to bring into association with or connection with"). *See also Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 695 (1933)." Employing that definition, this Court had no difficulty in determining that the HRL and the DBL both clearly relate to benefit plans since the HRL prohibits employers from structuring their plans in a specific manner and the DBL requires employers to pay its employees specific benefits.

The *Shaw* court noted that Congress used the words "relate to" in their broadest sense in Section 514(a), since within the statute itself, Congress saw fit to specifically exempt generally applicable state criminal statutes from the preemption provisions in §514(b), 29 U.S.C. §1144(b). The Court also indicated that the intention that these words be interpreted in their broadest sense was apparent from the legislative history of §514(a). There, the conference committee rejected a more limited scope to the ERISA preemption provisions and expressly provided for the present language. The committee indicated that the section's preemptive scope was as broad as its language. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

Comparing the Ninth Circuit test for ERISA preemption to the above decisions of this court clearly establishes that the Ninth Circuit's decision is flatly contrary to this court's precedent. In its initial discussion of whether the California law was preempted, the Ninth Circuit set forth a two-part test requiring far more than the "relates to" test established by the *Shaw* court. On this point, the Ninth Circuit stated:

> Section 1160.3 is preempted if it *both* 'relate[s]' to an ERISA plan *and* 'purport[s] to regulate, directly or indirectly,' ERISA plans.

781 F.2d at 1356 (cites omitted) (emphasis supplied).

The appellate court expressly stated that it was adding a second prong to the "relates to" test established by the *Shaw* court, requiring further that the challenged law also "purport to regulate" an ERISA plan before it is preempted. On this point, the appellate

court stated:

> We have held, as has the Second Circuit, that under Section 514(c)(2) *a state law must also "purport to regulate" ERISA plans before it can be held to be preempted. Lane*, 743 F.2d at 1339; *Rebaldo*, 749 F.2d at 137 & n.1. This second prong of the preemption test seems to have been over-shadowed by the "relates to" test found in Section 514(a), although *the two prongs are both important. See Lane*, 743 F.2d at 1339; *Rebaldo*, 749 F.2d at 137 ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA). As a logical matter, if a state law does not "relate to" ERISA plans, it cannot "purport to regulate" them, for "relates" includes, but is much broader than, "purports to regulate." Thus, we conclude that, a fortiori, California Labor Code § 1160.3 does not "purport to regulate" ERISA plans.

781 F.2d at 1359 (footnote omitted) (emphasis supplied).

The appellate court's decision also disregards this Court's express language in *Shaw*, stating that a state law can be preempted even if it is not designed to affect employee benefit plans and is not designed to deal with the subject matters covered by ERISA. Specifically, in *Shaw*, this Court stated:

> To interpret Section 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of Section 514.
>
> * * *
>
> Nor, even with legislative history, can Section 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility and the like.

463 U.S. at 98.

After reviewing a number of ERISA preemption cases, the appellate court ignores the above statement of this Court to conclude:

> The principle underlying all of these decisions would appear to be that the state law is preempted by Section 514(a) if the conduct sought to be regulated by the state law is "part of the administration of an employee benefit plan"; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans. See *Scott,* 754 F.2d at 1505.

781 F.2d at 1357-58.

In its closing comments, the appellate court again shows that it has acted flatly contrary to this court's precedent in *Alessi.* In *Alessi,* this Court held that regardless of the purpose or purposes of the challenged statute, if it relates to an ERISA plan, it is preempted. This Court pointed out that it is "of no moment that New Jersey intrudes indirectly through a worker's compensation law, rather than directly through a statute called pension regulation [to be preempted]." In sharp contrast, the appellate court looks to the purpose of the state law in determining that it was not preempted. On this point, the appellate court stated:

> We cannot ignore the reality that when Congress enacted ERISA, "federal exclusivity [was] a corollary of regulatory coverage, not an independent statutory goal." *California Hospital Association,* 770 F.2d at 861. ERISA does not purport to regulate the broad spectrum of unlawful employment practices that may be committed by employers: thus ERISA does not prevent a state agency from including in its "make-whole" awards sums calculated with reference to fringe benefits.

781 F.2d at 1359.

Thus, it is clear the appellate court disregarded Congress' intent and this Court's mandate established in *Shaw* and *Alessi* when it reached its conclusion that the challenged state law is not preempted.

More recently, in *Metropolitan Life Ins. Co.,* 105 S. Ct. 2380, this Court analyzed a Massachusetts statute to determine if it was preempted by ERISA. The statute in question mandated that certain minimum mental health care benefits be provided to Massachusetts residents insured under general health care plans covering hospital and surgical expenses. The appellants, insurance companies required to provide these minimal health benefits, argued that the Massachusetts law was preempted by ERISA. The State of Massachusetts maintained that this law is a "law which regulates insurance" and as such is saved from the general preemption clause of ERISA.

The Supreme Judicial Court of Massachusetts held that the statute was not preempted by ERISA. On appeal to this court, 463 U.S. 1221 (1983), the judgment of the Supreme Judicial Court was vacated and the case remanded for further consideration in light of *Shaw.* The Supreme Judicial Court reinstated its former judgment and the insurers appealed again to this court.

In reliance on the preemptive interpretation of *Shaw* and *Alessi,* this Court quickly concluded that the Massachusetts law "related to" an employee benefit plan and, therefore, was within the reach of ERISA's preemption provision. The Court stated that the statute was within the preemption scope even though it was consistent with ERISA. The court ruled that even though the law in question was *not a benefit plan law,* it bore "indirectly but substantially" on insureds' benefit plans, as it required them to purchase the mental health benefits specified in the statute. This precise reasoning applies to the instant case.

As in *Metropolitan Life Ins. Co.,* Labor Code § 1160.3, as construed by the ALRB, requires employers to provide a certain level of benefits on certain terms to its employees. Although § 1160.3 does not "purport to regulate" an employee benefit plan, its application by the ALRB bears substantially on the petitioner's benefit

plans as it is in fact creating a benefit package. Clearly, a law requiring an employer to provide a set level of benefits, on set terms, on an ongoing basis, relates to an employee benefit plan and is therefore preempted.

In *Metropolitan Life Ins. Co.,* The Massachusetts law was saved from preemption as it satisfied the provisions of the "deemer clause" which sets out an exception for laws regulating insurance. As § 1160.3 is clearly not an insurance law, it is not saved by the exception and thus is clearly preempted.

II

SUPREME COURT REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS' HOLDING THAT THE MAKEWHOLE REMEDY IS NOT PREEMPTED BY ERISA IS BASED ON A FUNDAMENTAL MISCHARACTERIZATION OF THE NATURE OF THAT REMEDY

The Court of Appeals' conclusion that the fringe benefit portion of an ALRB makewhole award is not preempted by Section 514 of ERISA is premised on its incorrect perception of the makewhole award as a "one-time, lump-sum payment." In fact, the makewhole award is not a "one-time, lump-sum payment," but is actually an ongoing obligation involving a potentially limitless number of payments. When properly characterized, it is clear that the makewhole award does "relate to" employee benefit plans, and hence is preempted by ERISA. Accordingly, Supreme Court review is necessary to protect ERISA's Congressionally-intended purpose of reserving to the Federal Government the sole power to regulate the field of employee benefit plans.

The ALRB is authorized by California Labor Code Section 1160.3 to order an employer to make its employees whole for losses resulting from the employer's refusal to bargain. To calculate the amount of makewhole due to the employees, the ALRB has devised a system whereby it estimates the difference between the pay the employees received and the pay that they theoretically would have

received but for the employer's refusal to bargain in good faith. That difference is arrived at by comparing the amount of the employees' pay with the amounts received by employees under successfully negotiated collective bargaining agreements *(Holtville Farms, Inc. v. ALRB,* 168 Cal.App.3d 388, 391-392 (1985); *Adam Dairy,* 4 ALRB No. 24 (1978) App. A-1a.

The ALRB also determined that the term "pay" would include fringe benefits.

> The record in this case shows that the UFW has standard contractual clauses providing for health and medical coverage through the Robert F. Kennedy Health Plan, pension benefits through the Juan de la Cruz Pension Plan, and social educational services through the Martin Luther King Fund, as well as clauses providing, where appropriate, for such benefits as overtime pay, shift premiums, paid vacations and holidays, and compensation during travel time and standby time. All such items are encompassed by the term "pay" and it is therefore within our power to order that employees be compensated for their loss.
>
> * * *
>
> We begin first with the concept that fringe benefits are an element of the total compensation paid by an employer to an employee. In some instances, this compensation is diverted to deposit the funds which provide benefits to the employees through an administered plan. In other forms, it is paid directly to employees; for example, overtime, vacation pay, holiday pay, standby pay, etc. Irrespective of the form which the benefit takes, however, it is ultimately calculable in terms of a dollars per hour figure. Because these various benefits are employee compensation, and hence pay within our broad definition, it is our intent to order that their value be paid directly to the workers involved as an aspect of the

gross makewhole award.

Adam Dairy, 4 ALRB No. 24, App. A-6a, 18a.

The ALRB, taking judicial notice of publications of the U.S. Department of Labor, Bureau of Labor Statistics, held that fringe benefits constitute 22 percent of an employee's total compensation. Consequently, it held that the amount of makewhole awarded to an employee would be calculated by assuming that the amount determined to be the wages an employee would have recieved if the employer had bargained in good faith, was only 78 percent of his total compensation, and that an additional 22 percent must be added for fringe benefits.

In *Robert H. Hickam,* 9 ALRB No. 6 (1983), App. F-95a, the ALRB modified its method of calculating fringe benefits. The ALRB deducted 6.3 percent from the 22 percent fringe benefit figure because that percent represented madatory fringe benefits, such as unemployment insurance and social security, which were not subject to collective bargaining. In this regard, the ALRB stated:

> [I]n order to make an employee whole, the wage rates computed pursuant to the previously stated formulas (both hourly and piece rates) will be assigned a value of 78.0 percent and fringe benefits will be assigned a value of 22.0 percent, 15.7 percent for voluntary benefits and 6.3 percent for mandatory benefits.
>
> The evidence shows that Respondent herein made the legally required payment to those funds. As the employees have actually received the benefit of those legally required fringe benefits, there is no need for us to provide for them as part of a makewhole award. Therefore, the gross makewhole wage shall be reduced by 6.3 percent to reflect the mandatory payments made by Respondent.
>
> Voluntary payments made to fringe benefit funds or directly to the employee shall be deducted from

> the gross makewhole award to the employee for that particular year. In this case, those employees who received vacation pay and/or bonuses shall have their makewhole awards for that year reduced by the amounts they actually received in such fringe benefits.

9 ALRB No. 6, App. F-103a-104a[1] (emphasis supplied.)

The ALRB's makewhole award against petitioners mandates that they pay directly to their employees 22% of an ALRB established hourly wage for certain fringe benefit contributions the ALRB deemed was due. The make-whole award so constituted does not make allowances for employer-determined eligibility requirements, vesting requirements, proration requirements, or any other restrictions upon payment of these monies, including tax ramifications. This is a similar situation to that faced by this Court in *Alessi*.

The state law in question, Labor Code § 1160.3, as interpreted by the ALRB in its decisions *Perry Farms, Adam Dairy,* and *Hickam*, directly regulates all aspects of the benefit programs provided by the petitioners, including eligibility, participation, vesting, benefit accrual, forfeitures, tax implications, as well as disclosures. The ALRB's makewhole remedy, as it relates directly to these petitioners, mandates that they provide direct payments without regard

---

[1] In a subsequent case, J.R. Norton Co., 10 ALRB No. 42 (1984), the ALRB again changed its method of computing the amount of makewhole due for fringe benefits. The ALRB held that in cases from that date on, fringe benefits would be calculated in the same manner as that used to calculate wages for a makewhole award: by comparing the value of fringe benefits actually received by the employees with the value of those received under contracts which were successfully negotiated with the union. Accordingly, the fringe benefits given under these contracts—medical benefit plans, pension plans, special holidays, rest periods, overtime, etc.—are all imposed on the respondent employer pursuant to the makewhole award. *J.R. Norton Co.* was reversed on other grounds and remanded to the ALRB by the California Court of Appeal in an unpublished decision; but the ALRB has at no time indicated that it will not be following the method of calculating makewhole awards for fringe benefits announced in that case. *J.R. Norton Co.'s* holding in regard to fringe benefits is discussed in a subsequent California Court of Appeal case, *Holtville Farms, Inc. v. ALRB*, 168 Cal.App. 3d 388 (1985).

to eligibility requirements; whether or not the employees would be entitled to participate, and without regard to what, if any, vesting or forfeiture requirements would or would not be specifically applicable under the ERISA statutes. The make-whole award instead mandates that a direct, out-of-pocket, specified cash payment be made to employees to compensate for fringe benefits without regard to petitioner designed preconditions which are specifically validated under ERISA.

Clearly, the ALRB's makewhole award "relates to" employee benefit plans of the type regulated by the provisions of ERISA. The ALRB orders sums of money awarded to employees based on the amounts of fringe benefits it deems would have been given to the employees but for the employer's refusal to bargain. The amount of the fringe benefits package is determined by looking at the fringe benefits—medical plans, pension plans, vacation programs, etc.—provided in other contracts, regardless of what fringe benefits are actually provided by the employer.

Nonetheless, the Court of Appeals held that the fringe benefit portion of the makewhole award was not preempted by ERISA. This result was reached because of the Court's incorrect understanding of the nature of the makewhole award.

The District Court in the instant action found that the ALRB's makewhole award is a "one-time award of employee damages..." (Findings of Fact and Conclusions of Law, p. 9, App. H-140a). The Court of Appeals continued this erroneous conception of the nature of the award. A makewhole award, the Court of Appeals found, is only a "one-time, lump-sum payment." 781 F.2d at 1353. Therefore, the Court held that ERISA did not preempt the fringe benefit portion of a makewhole award because a makewhole order "is no more than an order to the Employers to pay damages to their employees; it is no different from any other award of damages." 781 F.2d at 1353, 1358.

The Court of Appeals has fundamentally misconstrued the nature of the makewhole award. Unlike other damage awards, the makewhole award is *not* a "one-time, lump-sum payment." Instead, it is an ongoing, continuous remedy which can involve a poten-

tially unlimited number of payments.

The ALRB makewhole orders applicable to petitioners do not have a fixed dated upon which liability is cut off. The makewhole obligation extends "until such time as [the employer] commences good faith bargaining with the [union] which results in a contract or a bona fide impasse." (Adam Dairy App. A-13a.)

The makewhole award is not, therefore, a "one-time, lump-sum payment;" it is an obligation that continues until either a contract or a bona fide impasse is reached with the union. Thus, although the compliance hearings for any ALRB order might establish the amount due at that time under the makewhole remedy, the employer's obligation to continue making payments at the ALRB determined level is ongoing until such time as one of the above two conditions is met. Thus, at a later point in time, if the union and employer have still not reached a contract or impasse, and the employer has not raised his fringe benefit level to the levels established in the makewhole order, there will be another hearing determining how much is owed at that time. This process continues into the future and until such time as a contract or impasse is reached.

Properly analyzed, then, the makewhole award is an ongoing obligation of the employer. As previously explained, a substantial portion of that award is an amount designed to represent fringe benefit payments which might have been made if the employer had bargained in good faith. Regardless of the type and level of fringe benefits payments actually made by the employer, regardless of the employer's vesting and eligibility requirements, the ALRB determines what amounts of fringe benefits the employer should have been paying based on the fringe benefit plans of other employers, and orders that amount paid. If, as is the case with these petitioners, no contract or bona fide impasse is reached with the union, the ALRB-imposed fringe benefit plans go on indefinitely. The discretion given to the employer by ERISA as to which benefit programs to offer, the levels of those fringe benefits, and the vesting and eligibility requirements of those programs, has been taken away by the ALRB's makewhole award. Consequently, when the makewhole remedy is properly characterized, it becomes obvious that its fringe benefit portion is preempted by ERISA.

Petitions for Rehearing and Suggestion for Rehearing En Banc were filed with the Court of Appeals, in which the Court's erroneous perception of the duration of the makewhole remedy, and the effect of that misperception, were brought to the Court's attention. The Court of Appeals' only apparent response was an Order, dated April 1, 1986, adding a footnote to its Opinion:

> While a 'makewhole' order does require the employer to continue to make its employees whole until such time as it bargains in good faith, the practice of the ALRB appears to be to fix specific beginning and ending dates and calculate the 'makewhole' amount for that period. The award is the final award for that period. Then, if it is later determined that the employer continued to act in bad faith, a new ending date is fixed, and a new award is made, covering the period from the first ending date to the new ending date. Thus, a lump-sum award is made for each period. [citations omitted]."

App. K-164a.

This footnote, while appearing to perhaps recognize that the makewhole award is potentially unending, completely fails to address the effect of that fact upon the Court of Appeals' holding in the case. The opinion is still premised on the Court's characterization of the makewhole award as a "one-time, lump-sum payment." As explained above, when it is realized that the makewhole remedy is an ongoing obligation, mandating an employer to pay certain benefits at certain levels for an indefinite duration, it necessarily follows that the fringe benefit portion of the makewhole remedy is preempted by ERISA.

Supreme Court review is therefore necessary in this case to correct the Court of Appeals' erroneous analysis of the makewhole award, and hence to correct the Court of Appeals erroneous holding that the fringe benefit portion of a makewhole award is not preempted by ERISA. Only by granting this Petition for Review, and subsequently reversing the Court of Appeals' decision, can this Court protect the Congressional intent, as embodied in ERISA, to reserve

to the federal government the sole power over the field of employee benefit plans.

III.
THE MAKEWHOLE AWARD DIRECTLY CONFLICTS WITH PROVISIONS OF ERISA.

As previously discussed, this Court has held that it is not necessary for a state law to conflict with provisions of ERISA to be preempted. Preemption takes place merely if the state law "relates to" employee benefit plans. In the instant case, not only does the Act and the ALRB's actions "relate to" employee benefit plans, but *the makewhole award requiring payments for fringe benefits directly conflicts with various provisions of ERISA.*

In awarding its gross makewhole award, the ALRB includes a direct payment calculated to represent the monetary value of fringe benefits the employee would have received but for the employer's alleged unlawful conduct.

In *Adam Dairy*, the ALRB went on to detail the exact method it uses to determine the value of the benefits it includes in its award. By this method, the ALRB mandates which benefits will be provided for precise benefit levels, determines who is to recieve those benefits, and finally determines how these benefits are going to be paid. Lastly, and most intrusively, by including payments that should have been paid to employee benefit plans as part of the gross makewhole award, appellees are altering the tax consequences established in ERISA.

First and foremost, while ERISA does set various uniform standards including rules concerning reportings, disclosures and fiduciary responsibilities, it does not mandate that employers provide any particular benefits to is employees. *Shaw*, 463 U.S. at 91. ERISA also does not mandate specific eligibility standards for participation in an ERISA covered plan. Such eligibility standards are left to the discretion of the employer. What ERISA does require are *minimum* standards for participation in ERISA plans. Section 202 of ERISA, 29 U.S.C. § 1052 provides that a pension plan must allow an employee to participate no later than the earliest date at

which he has completed at least one year of service and is 25 years old.

Similarly, ERISA allows employers to establish their own vesting requirements for plan coverage, with a certain minimum. Section 203 of ERISA, 29 U.S.C. § 1053 imposes limits on the period of service a plan may require an employee to complete before the employee's accrued benefits become nonforfeitable (i.e., "vesting").

In the same regard, the employer is permitted to establish when payment of benefits will commence. Section 206(a) of ERISA, 29 U.S.C. § 1056(a) simply provides that a plan generally must provide for the commencement of payment of pension benefits at the later of either the time the employee participant reaches age 65, the tenth anniversary of the employee's participation in the plan, or the date of the employee's termination of service.

With the above provisions in mind, it is apparent that the ALRB has taken it upon itself to modify provisions of ERISA established by Congress. Congress has allowed employers to determine their own eligibility standards, vesting requirements, benefit commencement schedules, levels of benefits, and to decide whether they will have a plan at all. The ALRB has taken away that Congressionally-granted discretion, and imposed its own requirements on employers.

The ALRB has mandated that petitioners, and each of them, maintain specified plans for the makewhole period. Further, the ALRB has established the eligibility for receipt of such benefits (employment at any time during the makewhole period, *Robert H. Hickam*, App. F at 104a), the vesting requirements (none), commencement date of payments, and lastly, the level of such benefits. Not only has the ALRB eliminated the discretion left to employer, but they have established new minimums for all of the above aspects of the relevant plans.

According to ALRB decisions, if an employee within the relevant unit worked one hour within the makewhole period, that employee would be entitled to a payment which is comprised of the ALRB's estimation of the benefits he would have recieved. This payment includes benefits from the medical plan, pension plan,

Martin L. Luther King Fund, vacation and holiday. *Hickam.* Under ERISA and the then existing benefit plans of petitioners, this same individual would not be eligible for any benefits. This is a *prima facie* showing that not only do the challenged actions of the ALRB "relate to" employee benefit plans, they directly conflict with provisions of ERISA.

An even more telling example of how the challenged actions of the ALRB conflict with the provisions of ERISA is the tax implication of said actions. ERISA was enacted to be a comprehensive statute encompassing modifications in labor law, the Internal Revenue Code (hereinafter "IRC"), and other various federal laws. These modifications were all undertaken to provide a complete national standard for the design, administration, and operation of private employee benefit plans.

Under the IRC, amounts paid by an employer to an ERISA qualified health plan for compensating an employee (through insurance or otherwise) for personal injuries or sickness are not includible in the employee's gross income for income tax purposes (26 U.S.C. § 106) or in the employee's wages for purposes of employer or employee social security, railroad retirement, unemployment insurance, or payroll taxes (26 U.S.C. § 3121(a)(2), § 3131(e), and § 3306(b)(2)).

Benefits paid to an employee under an ERISA qualified employer health plan are excluded from gross income for income tax purposes and from wages for employment tax purposes, if the benefits are paid directly or indirectly to the employee as reimbursement for expenses incurred by the employee, or the employee's spouse or dependents, for medical care (26 U.S.C. § 105(b)). A deduction generally is allowed to an employer as an ordinary and necessary business expense for employee compensation paid in the form of contributions to a health plan (26 U.S.C. § 162).

Further, if an employer-provided fringe benefit program qualifies under certain statutory provisions of the income tax law and ERISA, then the benefits provided under the program are excludable (generally subject to dollar or other limitations) from the employee's gross income for income tax purposes. (The income

tax exclusions also generally apply for payroll tax purposes.) Those costs which are excluded from the employee's income nonetheless are deductible by the employer (as are costs not so excluded), provided that they constitute ordinary and necessary business expenses (26 U.S.C. § 162).

Under present ALRB decisions, the above-discussed benefit payments are included in a gross makewhole award. Such awards would be considered straight income to the recipient employees, and would be taxable as ordinary income. *Social Security Board v. Nierotko*, 327 U.S. 358 (1946); IRS Letter Rulings 8052103 (Oct. 3, 1980) and 7851085 (Sept. 22, 1978), CCH IRS Letter Rulings Reports, App. P-Q.

Where an employer would be making a specified contribution to an employee's health plan, that contribution would not be taxable income. This is so even if the employee takes advantage of the health plan and is reimbursed for medical expenses. Pursuant to the ALRB award, the employee is to directly receive the value of the employer's contribution to the health plan in cash. Such a payment *is taxable* if not made for reimbursement for actual medical expenditures (26 U.S.C. § 105(b)).

It is apparent that Congress left certain decisions regarding ERISA covered programs to the employer. Such decisions include when an employee would be eligible for benefits, when such benefits would become non-forfeitable, the level of such benefits, and other such decisions relating to the administrative functions of the plans. It is also clear that the ALRB, by its makewhole remedy, has taken away such discretion from the employer, and mandated new terms upon the parties. Regardless of whether such actions are warranted because the employers have allegedly violated the California Labor Code or because said employers discriminated against an employee based on pregnancy as in the *Shaw*, such actions are in conflict with ERISA, relate to ERISA, and, therefore, are preempted by ERISA.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Wayne A. Hersh
Charley M. Stoll
Alan J. Saxe
HERSH & STOLL
2 Park Plaza, Suite 800
Irvine, CA 92714
(714) 474-8224

Attorneys for Petitioners
Martori Bros., O.P. Murphy
Produce Co., J.R. Norton Co.

Scott A. Wilson
Scott A. Johnson
LITTLER, MENDELSON,
FASTIFF & TICHY
701 "B" Street, Suite 300
San Diego, CA 92101
(619) 232-0441

Attorneys for Petitioner
Mario Saikhon, Inc.